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1400 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

(202) 939-7900
FACSIMILE (202) 745-0916
INTERNET fw@fw-law.com

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October 28, 1996

VIA HAND DELIVERY

Meredith J. Jones, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 95-184 (Inside Wiring)

Dear Ms. Jones:

This letter is in response to Bartholdi Cable Company, Inc.'s ("Bartholdi") *ex parte* submission of August 23, 1996 in CS Docket 95-184 (Inside Wiring). In its letter, Bartholdi resubmitted its reply comments in CS Docket 96-133 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming) for inclusion in the Inside Wiring rulemaking docket.

At the outset, Time Warner reiterates its position in this proceeding. Retaining the existing demarcation point for multiple dwelling unit ("MDU") buildings is the most pro-competitive solution. This option protects the incentives of building owners and competitors to install multiple distribution systems in MDU buildings, thereby promoting facilities-based competition and ensuring that MDU residents share the benefit of having access to more than one provider from which to receive multichannel video, telecommunications, and high-speed

Internet services. This option also ensures that MDU residents are not required to take service from the single provider chosen for them by their landlord.

In advocating just the opposite approach, Bartholdi, in its supplemental comments in Docket 96-133, makes reference to and includes a decision by the New York Supreme Court in Time Warner Cable of New York City v. Board of Managers of the Dorchester Condominium, Index No. 109157/96 (Sup.Ct.N.Y.Co. July 16, 1996) (the "Opinion") which involves a building served both by Time Warner and Liberty Cable ("Liberty"). For the sake of accuracy, a full factual summary of the situation at the Dorchester is included as Attachment 1 hereto. In any event, the court's Opinion speaks for itself, and is submitted as Attachment 2. Quite simply, Liberty's efforts to distort both the facts involved and what the court decided to further its own agenda in this proceeding should be rejected.

For example, contrary to the impression sought to be conveyed by Bartholdi's comments, Liberty has the right to, and is continuing to serve its customers at the Dorchester. The court merely issued a preliminary injunction prohibiting the owner of the building in question, Dorchester Towers Condominium (the "Dorchester"), from allowing Liberty to run its wiring to individual subscribers' units through the custom colored and sized hallway moldings owned by Time Warner. Those moldings had been installed by Time Warner at the specific request of Dorchester in 1994 at a cost to Time Warner of nearly $60,000 (Opinion, p.9.) The court specifically relied upon evidence that competitors have numerous options for running wiring to individual condominium units without misappropriating Time Warner's property (Opinion, p.8), and that the moldings were not large enough to accommodate Liberty's cable equipment without jeopardizing the integrity of, and Time Warner's future ability to use, its moldings to provide its own services to its subscribers (Opinion, p. 3-4, 11-12).

In submitting its inaccurate version of the Dorchester situation, Bartholdi is advocating a fundamental change to the Commission's home wiring rule, dramatically moving the point of demarcation for cable distribution facilities in MDU buildings -- a policy that would reduce competition in those buildings. Bartholdi's proposal would snuff out facilities-based competition in MDUs, and thus would thwart the Commission's objective to foster subscriber choice of telecommunications providers by generally relegating MDU residents to the receipt of telecommunications and video programming services from a single provider. In addition, such an unjustifiable change to the Commission's existing MDU point of demarcation would directly contravene the pro-competitive policy established generally by Congress in the Telecommunications Act of 1996 and the specific provision (47 U.S.C. § 572(d)(27)) designed to ensure that cable operators are able to maintain ownership of their distribution infrastructure, including any wiring in MDU buildings located outside the individual dwelling units of end users.

Time Warner continues to believe that it is not necessary or desirable to change the demarcation point in order to allow competition to flourish. While Time Warner continues to object to any rule that would require a cable operator to surrender ownership or control of its own cable facilities installed in common areas of MDU buildings, Time Warner has no objection (subject to negotiation of commercially reasonable terms) to exploring cooperative approaches which will allow multiple providers to construct distribution facilities in MDU buildings. Indeed, Time Warner has included in the attached Appendix a discussion of just such a situation involving another MDU building in New York City, Eleven Riverside Drive, where Time Warner has cooperated fully with Liberty's construction of its own distribution facilities, thus engendering greater consumer choice.

The changes to the MDU point of demarcation advocated by Liberty and the entrenched telcos would authorize a landlord, subscriber, or competitor to seize the cables installed by cable operators throughout the common areas of MDU buildings. Such behavior stifles competition and disables the entity which bore the cost of installing the facilities from offering new and innovative services. It is shortsighted to assume that MDU residents will have no desire in the future to receive at least some services from a cable operator once he or she has decided to take certain other services from an alternative provider. High-speed Internet, pay-per-view opportunities and telecommunications services may be offered by franchised cable operators and should continue to be available to MDU residents even after (and while) such residents might subscribe to more traditional cable services from an alternative video service provider. A policy allowing competitors to divest the franchised operator of its MDU cable infrastructure effectively prevents cable operators from offering <u>any</u> of their services to residents once such a resident has decided to sample a competitor's service, unless that resident can thereafter be persuaded to cancel the new video service and resume taking <u>all</u> his broadband services from the original cable operator. True competition and innovation are enhanced by protecting cable operators' multi-billion dollar investment at MDU buildings.

Indeed, the Commission's existing home wiring rules, initially issued on February 3, 1993, which established the current point of demarcation in MDU buildings, have been remarkably successful in promoting competition. As the chart set forth below vividly demonstrates, prior to adoption of the current MDU point of demarcation, there were only 17 MDU buildings in Manhattan serving 3,167 units where residents enjoyed the availability of both Liberty's and Time Warner's services. Under the present MDU point of demarcation rule, this situation has grown steadily, to the point today where 143 buildings containing over 45,000 units in Manhattan alone now have both services available.

MDU BUILDINGS IN MANHATTAN SERVED BY BOTH TIME WARNER AND LIBERTY

Year	Buildings	Units
1992	17	3,167
1993	57	8,924
1994	91	16,924
1995	120	35,254
1996	143	45,009

Moreover, the Commission's existing demarcation point is not only working in major markets such as New York City, where large-sized competing MVPDs (*i.e.*, Liberty) are energetically installing their own overlapping wiring, it is also working in medium and smaller markets with smaller sized MVPDs. For example, in Harrisonburg, Virginia, a community of 30,000, telco-affiliated CFW Wireless, a wireless cable operator using MDS technology, has wired approximately a dozen of the town's apartment complexes and is serving over eight hundred residences via wiring installed side-by-side with Time Warner Cable. Due to the existing home wiring rules, a steadily growing universe of MDU residents can receive multichannel video service from at least two providers because their MDU buildings have been wired with multiple sets of broadband distribution facilities. If the Commission alters the demarcation point, this trend will be abruptly halted and the incentive and ability to construct multiple broadband distribution systems in MDU buildings will be eliminated.

The Commission's choice in its home wiring proceeding is clear and simple. It can choose to retain its existing rules, which protect the incentives of building owners and competitors to install multiple distribution systems in MDU buildings, thereby promoting facilities based competition. Conversely, it can choose to alter the point of demarcation, thus allowing a new entrant to seize the MDU distribution infrastructure installed at the incumbent provider's expense, and thereby eliminate the opportunity for MDU residents to obtain services from multiple broadband distribution systems within the building. The latter course is directly contrary to the goal of maximizing consumer choice.

Time Warner urges the Commission to reaffirm its existing rules and retain the current pro-competitive point of demarcation for MDU buildings.

Very truly yours,

Arthur H. Harding

Arthur H. Harding
Counsel for Time Warner Cable

CAG:kma:44249.8

cc: Rick Chessen
Larry Walke

ATTACHMENT 1

- **The Dorchester Case Is A Unique Situation Due To Recent Installation Of Smaller Custom Molding At The Landlord's Direction.**

Bartholdi's reliance on the Dorchester case is misplaced and the facts of the case simply demonstrate the consequences of Liberty's refusal to consult with Time Warner before it commences using and misusing Time Warner's cable facilities. In 1991, Time Warner upgraded its facilities at the Dorchester and installed large, new cove moldings in the building. These moldings would have been large enough to accommodate a competing cable system. In 1994, just three years after this installation, the Dorchester decided to redecorate its hallways and requested that Time Warner install new smaller custom-colored moldings. This request also required Time Warner to install an additional riser in the building so that there would be fewer homerun cables within the moldings at any one point in order to accommodate the moldings' smaller size. As reflected in the court's Opinion (pp. 2, 9), Time Warner spent over $59,000 for this new molding installation and re-wiring, which Time Warner had no legal duty to undertake. In recognition of this expense, and to protect its future ability to provide safe and reliable service, Time Warner requested and obtained an agreement from Dorchester recognizing Time Warner's ownership of its newly-installed cable facilities, including the moldings (Opinion, pp. 1-2).

Two years after the installation of the new molding, Dorchester permitted Liberty to wire the building using Time Warner's moldings. Time Warner was in no manner informed or consulted before Liberty began running its own wiring through Time Warner's molding. Time Warner did not seek to deny Liberty access to the building. However, it did object to the Dorchester allowing Liberty to unlawfully occupy Time Warner's molding without any prior consultation with Time Warner to protect Time Warner's rights.

Time Warner's objection resulted from more than just having its property unilaterally converted for the benefit of a competitor, although that is not an insignificant element of Time Warner's grievance. Because of the small size of the molding (which was specifically requested by Dorchester in 1994 and customized for that location), it is physically impossible for Liberty to use the molding without jeopardizing Time Warner's own use of its property (Opinion, pp. 3-4, 11-12). The smaller custom molding simply cannot accommodate two sets of cable facilities. The jamming of Liberty's wires and taps into the custom molding has caused bulging and damage to the molding itself, and jeopardizes Time Warner's distribution system's future ability to provide adequate service. Time Warner made clear in a letter to Dorchester before Time Warner commenced litigation that Time Warner would welcome the opportunity to discuss with Dorchester and Liberty alternative methods of installation which would protect Time Warner's rights if Dorchester would direct Liberty to discontinue its unauthorized interference, but Dorchester and Liberty simply continued their installation work using and damaging Time Warner's property. There were a variety of options available to Dorchester and Liberty had they behaved in a reasonable manner and consulted with Time Warner, including the installation of a new normal-size molding, able to accommodate both Liberty and Time Warner systems. Liberty, however, did not wish to discuss a cooperative solution.

As the court recognized, there are several simple and practical options for Liberty to access subscribers in the building without using Time Warner's molding. In its order implementing its July 16 decision, the court specifically authorized Liberty to access the molding within the "demarcation area," under existing FCC rules, to attach to the home wiring serving each apartment unit. Liberty has since that time demonstrated that it can

accomplish this, and any objection from the building as to the appearance of Liberty's installation is attributable solely to the deliberately inappropriate installation methods and materials used by Liberty. The court expressly stated that it found "credible" Time Warner's evidence as to the "several alternatives under which Liberty could provide service to the buildings" (Opinion, p. 8).

What must be recognized by the Commission is the unusual nature of Time Warner's facilities at the Dorchester. None of the events need have occurred had the Dorchester not requested Time Warner to replace existing moldings with smaller moldings that are unable to accommodate more than one set of wires. Such requests are rare, and the Commission should not, as Bartholdi would lead it to believe, consider the Dorchester situation as typical.

- **Typical Molding Installed In MDUs, Like The Molding At Eleven Riverside Drive, Has Been And Can Continue To Be Shared By Competitors.**

A more typical situation is presented at Eleven Riverside Drive ("Eleven Riverside"), a 640-unit cooperative apartment building in Manhattan. In 1991, acting pursuant to its franchise obligation to upgrade its cable system to 550 MHz throughout its Manhattan franchise area, Time Warner requested permission of Eleven Riverside Drive Corp. to install a new state-of-the-art distribution system in the building. A detailed upgrade plan was prepared by Time Warner and approved by the cooperative corporation, which retained outside counsel to represent it. The contract finally signed on March 27, 1992 gave the cooperative corporation substantial protection and imposed extraordinary costs on Time Warner. Also, as with the Dorchester, Time Warner had to agree, among other things, to install custom plastic moldings in the hallways to house Time Warner's cable. As with the Dorchester contract, the 11 Riverside Drive contract made clear that all of the cable facilities installed by Time Warner

were and would remain Time Warner's property, and that there would be no tampering with such facilities without Time Warner's prior consent. Finally, and just like the Dorchester contract, this contract did not require the building to pay for Time Warner's service but merely allowed Time Warner to provide service to residents who requested it, and in no way prevented the competing offering of video services by any other MVPD within the building.

Time Warner expended more than $116,000 to install its upgraded cable system in the building during 1992-93. In keeping with Time Warner's MDU design philosophy, and just as in the Dorchester, the system installed was a hallway homerun system. Time Warner placed distribution or junction boxes in stairwells and incinerator/compactor rooms, and from these boxes ran homerun cables through the hallways within newly installed plastic moldings.

In October 1995, Time Warner learned that Liberty was installing its service in the building, and inspection disclosed that instead of installing a complete cable system of its own -- contrary to prior assurances made to Time Warner by the building's management that Liberty had agreed to install its own facilities -- Liberty was breaking into Time Warner's distribution boxes and seizing thousands of feet of Time Warner's homerun cables in common areas throughout the building. Liberty proceeded to solicit Time Warner's customers through its parasitic approach of unlawful conversion of Time Warner's internal distribution facilities within the building. Even so, Time Warner retained (and continues to serve) numerous customers at the building who do not want Liberty's service. The quality of Time Warner's service to its remaining customers, however, was being jeopardized by Liberty's reckless interference with Time Warner's facilities.

On October 25, 1995, Time Warner wrote to the president of Eleven Riverside to advise him that Time Warner's rights were being violated. The building management was

chagrined to learn that Liberty had failed to honor its promise to install its own facilities, and ordered Liberty to stop using Time Warner's homerun cables and distribution boxes and to install its own cable. Time Warner made clear that it had no desire to force the building to install a second plastic molding in its hallways to house Liberty's cable and that Time Warner would allow Liberty to install a hallway tap system of its own, as well as a separate MATV system, in Time Warner's molding, provided that Time Warner was reimbursed for the use of its facilities and there were adequate safeguards to ensure that the quality and integrity of Time Warner's service was not impaired. This offer was made possible because, unlike at the Dorchester, and typical of most MDUs, the molding chosen by Eleven Riverside Drive could accommodate Liberty's separate distribution wiring. Furthermore, in order to prevent interruption of service to any resident who had already subscribed to Liberty's service, Time Warner agreed that Liberty could use Time Warner's moldings to house its cable for a 30-day period without charge, while the parties negotiated an agreement.

Eleven Riverside and Time Warner thereafter executed an agreement on July 29, 1996 under which Time Warner would sell Time Warner's molding to the building for $12,000 (less than 40% of Time Warner's actual cost), with the proviso that Time Warner, as well as Liberty and the building's MATV system, would be allowed to use it and that Time Warner would continue to be responsible for maintaining and repairing the molding for a fee of $1,000 per year. The agreement was not signed until more than nine months after Time Warner discovered Liberty's violation of its rights, because Liberty dragged its feet in signing a counterpart agreement with Eleven Riverside, which required Liberty to reimburse Eleven Riverside. Liberty's wires, Time Warner's wires, and a MATV system are now located within the same hallway molding. As a result of Time Warner's cooperative effort to

accommodate the desire of the building management to offer alternative services occupying the same molding, the residents of Eleven Riverside are able to enjoy a choice among Time Warner, Liberty, and MATV service, while Time Warner's legitimate interests are adequately protected.

Liberty's proposal to change the demarcation point would ratify Liberty's egregiously tortious conduct at Eleven Riverside, the Dorchester and numerous other buildings. It would not only allow video service providers to simply seize thousands of feet of cable installed by franchised cable operators at great expense in common areas of apartment buildings, often pursuant to arm's length contracts with building owners expressly preserving the cable operator's property rights, but it would allow such new entrants to use the associated moldings and conduits installed by the incumbent cable operator without any compensation at all. The Commission must ultimately reject such an anticompetitive change in the demarcation point.

- **The Commission Should Encourage Competing MVPDs To Work Together Towards The Goal Of Promoting Facilities-Based Competition.**

The Commission must recognize that the terms and conditions of shared use of cable operator-owned molding or conduit must necessarily vary from building to building, depending on such factors as the amount of the cable operator's capital investment, the remaining useful life of the facilities, the physical capacity of the conduit or molding in light of the cable operator's current and foreseeable future needs, the planned system design of the competitor, and the terms of the contract with the building owner. It would therefore be intrinsically unfair for the Commission to attempt to establish a rigid rule applicable to all buildings.

In the majority of buildings (such as Eleven Riverside Drive) there <u>is</u> enough capacity in the molding to accommodate one or more additional systems, but occasionally in some

buildings (such as the Dorchester) another system cannot be installed in the cable operator's molding or conduit without compromising safety, reliability of service, or appearance. In the latter situation, one solution, as we have already noted, would be for the building owner to install, or authorize the installation of, a second or new, larger molding. Alternatively, the distribution cable might be hidden unobtrusively between the top of the existing molding and the ceiling, a procedure which Time Warner has demonstrated to be entirely workable in the Dorchester. In many buildings, of course, it is not necessary to share a cable operator's conduits or moldings to permit entry of new competitors because service can be provided by different providers using diverse routes, e.g., internal conduits, preexisting MATV wiring, hallway moldings, and/or exterior wiring.

Therefore, rather than adopt an inflexible nationwide rule, the Commission should simply express its policy preference that cable operators and other video providers should attempt to negotiate commercially reasonable shared use agreements for moldings and conduits wherever it is technically feasible to do so. The circumstances vary so significantly from building to building and franchise area to franchise area, that any attempt to establish a uniform rule mandating the technical or economic terms and conditions of shared use of moldings or conduits is bound to be unfair and unworkable.

ATTACHMENT 2

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL E. HUFF PART 32
Justice

Time Warner Cable of N.Y.C.
The Bd of Directors thereof

INDEX NO. 109157/96
MOTION DATE 5/3/96 (D)
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

J.S.C.

IS RESPECTFULLY REFERRED TO JUSTICE

DATED: JUL 16 1996

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

1031

----------X

TIME WARNER CABLE OF NEW YORK CITY,

Plaintiff,

-against-

Index No. 109157-96

BOARD OF MANAGERS OF THE DORCHESTER CONDOMINIUM,

Defendant.

----------X

CAROL HUFF, J.:

Plaintiff Time Warner Cable of New York ("TWC") moves for an order granting a preliminary injunction prohibiting defendant Board of Managers of the Dorchester Condominium ("Dorchester") from converting, removing, severing, altering or misappropriating any of plaintiff's cable facilities; from exercising dominion and control over any of TWC's cable facilities; from interfering with TWC's access to its cable and cable facilities; and an order directing defendant to restore the cable and cable facilities to TWC's use and control.

TWC holds a cable television franchise from the City of New York, covering Southern Manhattan. The Dorchester, located at 155 West 68th Street, is within TWC's franchise area. TWC and its predecessors have provided cable service to residents of the building since 1969, and currently have 520 subscribers in the building. In 1994, pursuant to a contract, TWC rewired the cable facilities in the building and replaced TWC's existing molding with smaller custom colored flat-hinged molding specified by Dorchester.

Paragraph 1 of the contract authorizes TWC to install, maintain, remove, replace and/or relocate wirest, conduits, cables, amplifiers and similar devices.

Paragraph 5 states:

"Neither the owner nor the Agent...shall tamper, interconnect or interfere with, make any alterations to, or remove, or knowingly permit anyone not authorized by TWCNYC to tamper, interconnect or interfere with, make any alteration to, or remove any Equipment and/or converters except with the prior written consent of TWCNYC."

Paragraph 8 provides that the title to all installations shall remain with TWC. Moreover, paragraph 6 of the Custom Colored Molding Rider to the contract provides that title to all equipment, including the custom colored molding, shall remain with TWC.

After executing the contract, TWC retained a contractor, Rae Mar, to rewire the building. TWC paid the entire $59,000 cost of the work. The system, which was completed less than two years ago, includes vertical riser cables extending through the building's stairwells and laundry rooms, passing into and through distribution boxes located on each floor. From those junction boxes, "home run" cables run through plastic custom colored flat-hinged molding installed by TWC near the ceiling line in each floor's hallway. These moldings form an enclosed conduit structure to house the cables installed by TWC in order to reduce the risk of accidental or deliberate damage and to deter theft of service. When a tenant of the building requests cable service, TWC installs converters and

wiring in the individual apartment, and connects the apartment wiring to the "home run" cable that passes by the tenant's apartment unit in TWC's hallway molding.

The instant dispute arose when Dorchester permitted Liberty Cable ("Liberty"), a competitor of TWC, to wire the building for its own cable service. Liberty is a "video programming distributor" which is not currently required to obtain a cable franchise. TWC contends that Dorchester has violated its contract with TWC, and is tampering with or converting portions of TWC's cable facilities by permitting Liberty to provide its service at the building using TWC's cable facilities, including the TWC molding. According to TWC, Liberty is unlawfully running its own cables through TWC's molding. TWC maintains that the molding is too small to accomodate both TWC's existing "home run" cables and the new cables Liberty plans to install, without jeopardizing the integrity of TWC's system and service. As a result of the crowding of cables in the molding, TWC claims, TWC would lose a significant amount of business and have operational problems, including degradation of service and increased maintenance problems, unless the court issues an injunction. For example, TWC states, an overloaded molding may become detatched or cracked, expose cables, or cause damage to cable facilities in the molding, requiring TWC to make frequent maintenance and repair visits to the building to correct the problem. In addition, TWC contends that Liberty's use of TWC's cable facilities would deprive TWC of the chance to provide upgraded service in the future, e.g., telephone or Internet access.

TWC further states that Liberty would have an unfair competitive advantage if it were permitted to use TWC's cable facilities; this would permit Liberty to underprice TWC's service. Moreover, unless the injunction is issued, TWC says, cable companies such as TWC would lose their incentive to improve facilities. TWC asserts that the injunction would not prevent competition, in that Dorchester could intall at its own expense, or require its own cable designee, such as Liberty, to install, separate facilities of its own in order to offer another video service.

In order to be entitled to a preliminary injunction, the moving party must demonstrate a probability of success, danger of irreparable injury in the absence of an injunction and a balancing of the equities in its favor (Albini v. Solork Associates, 37 A.D.2d 835). The first question, then, is whether TWC has shown a probability of success.

Dorchester denies that Liberty's installation will interfere with TWC's ability to deliver cable service to Dorchester residents. Liberty began the installation of it system in late April, 1996. According to Dorchester, that installation is now complete with the exception of adding the microwave reception antenna needed to deliver Liberty's signal to the Dorchester and hooking up individual subscribers. According to Dorchester, the preliminary injunction sought by TWC would prevent Liberty from hooking up new subscribers. Liberty installed a separate vertical riser cable system which distributes Liberty's signal vertically throughout the stairwells of the building. Liberty has also placed

a single cable inside the plastic molding installed in Dorchester hallways (i.e., TWC's molding) to obtain access to each potential subscriber. None of the cables installed by Liberty in the hallway molding is actually affixed to anything. In other words, according to Dorchester, the Liberty cable occupies empty space and does not displace TWC cables in the hallway molding, and the hallway molding is large enough to hold the cables of both TWC and Liberty. Dorchester contends that the only feasible way for any cable company to enter most of the units in the Dorchester is through a hole over the doorway. That space, about three inches between the top of the door jam and the ceiling, is completely covered by the hallway molding. In other words, in Dorechester's view, there is no way that Liberty can obtain access to these units without going through an area already covered by the hallway molding. Thus, Dorchester claims, the preliminary injunction sought by TWC would prevent Liberty or any other competitor of TWC from providing cable service at the building.

Certain Federal Communications Commission (FCC) regulations, set forth below are relevant to this dispute. 47 C.F.R. § 76.802, relating to disposition of "home cable wiring," provides that upon voluntary termination of cable service by a subscriber, a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase wiring at the replacement cost, and the subscriber declines. "Cable home wiring" is defined as "the internal wiring contained within the premises of a subscriber which begins at the demarcation point." 47 C.F.R.

§76.5(11). The demarcation point in multiple unit installations is defined as a "point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. § 76.5(mm). Thus, the demarcation point for cable wiring in the Dorchester is the hallway molding and one foot into the hallway.

47 C.F.R. § 76.802(j) provides:

"Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber's side of the demarcation point, such as molding or conduit, to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps to ensure that an alternative service provider has access to the home wiring at the demarcation point."

In 47 U.S.C. § 544(i), Congress directed the FCC to prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of each subscriber. The legislative history indicates that the above provision is limited to the "cable installed within the interior premises of a subcriber's dwelling unit," and that it "does not apply to any wiring, equipment or property located outside the home or dwelling unit." H.R. Rep. No. 628, 102nd Cong., 2d Sess, at 118, 119 (1992).

TWC ackowledges that under the above regulations, it is required to permit Liberty some access to conduits from the individual apartments. However, in TWC's view, since the

demarcation point is about 12 inches outside the subscriber's apartment, TWC does not have to cede control of any area beyond that point. Thus, Liberty, or any other alternate service provider can open up the front of TWC's flat hinge moldings in order to sever the home wiring at about 12 inches outside the point that it exits the apartment and to connect such wiring to Liberty's own feeder cable, which can be run above or below TWC's molding.

In Paragon Cable Manhattan v. P & S 95th Street Associates, Index No. 130734-93 (Sup.Ct. New York Co., May 8, 1996, Justice Gammerman), the building owner contended that it was "unworkable" to limit the scope of the FCC's home wiring rule and that use of the cable operator's facilities throughout the common area had to be allowed. The court, however, declined to extend the home wiring rule to any area beyond the demarcation point, holding that the owner had not provided legal authority to support its expanded definition of "cable home wiring."

Section 3.3 of TWC's cable franchise states:

"In the operation of the System, the Company [TWC] shall not interfere in any way with, nor utilize, any master antenna system, satellite master antenna system or any other similar system within the building.

It is true that TWC, under its franchise agreement, must install a cable system of its own rather than use the internal master antenna television (MATV) conduit systems that were built into many apartment buildings at the time of construction. However, this does not mean that TWC must share its own facilities beyond

the demarcation point.

James Kelly, a foreman for TWC, submits a reply affidavit in which he describes several methods by which Liberty could provide service to Dorchester residents without infringing on TWC's cable facilities. For example, Liberty's cables can be installed in the area immediately above TWC's molding and below the ceiling, and drilling a hole in that area into the apartment unit. Since this is above the line of sight of persons passing through the hallway, it would not interfere with the aesthetics of the building. When a tenant chose to switch to Liberty's service, the existing home run cable leading into the apartment could be severed within 12 inches outside the apartment unit, the homerun cable would be pulled back into the apartment and out again through a new hole that can be drilled near the existing one, leading directly to Liberty's cable in the hallway. Liberty's tap for that customer can be placed either in the apartment or in the hallway above the molding. It would also be possible to drill the necessary hole below TWC's molding. If there were an apartment that could not accomodate the drilling of a hole outside TWC's molding, a connection to Liberty's service could be made using the existing hole in the molding; a hole would be drilled in the top or bottom of TWC's molding in an area within 12 inches of the point of entry to the apartment, pulling the existing homerun through such newly drilled hole, and connecting it to Liberty's cable above or below the molding. The Kelly affidavit is credible and provides several alternatives under which Liberty could provide service to the building.

Public Service Law § 228 states that no landlord shall interfere with the installation of cable television facilities upon the premises, except that the landlord may require, inter alia, that the installation of cable facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants, and that the cable company or the tenant (or a combination of them) bear the cost of the installation, operation or removal of such facilities. Dorchester claims that under the above provision, TWC was already obligated to put in the custom colored molding in the hallway, so that the TWC-Dorchester contract lacks consideration. In response, TWC points out that it performed a rewiring and replacement of molding with smaller custom colored molding at Dorchester's request, in connection with a remodeling of the building. Since TWC had installed an upgraded cable system three years before, and there is no claim that the pre-existing system was inadequate, there was no legal requirement that the new custom colored moldings be put in. TWC in fact provided consideration for the agreement; it spent $59,000 on the work. Dorchester further contends that the agreement is void because it is perpetual in nature. TWC says that the agreement is not perptetual because it ends upon the termination of TWC's franchise. In response, Liberty contends that TWC has a virtual guarantee that its franchise will be renewed in perpetuity (47 U.S.C. § 546).

Dorchester cites an Ohio case in which a cable contract was voided

for being perpetual in nature. There are, however, cases in which a contract having no definite date for termination can nevertheless be valid. For example, in Ketcham v. Hall Syndicate, 37 Misc.2d 693, aff'd 19 A.D.2d 611 (1st Dept.), an agreement for the syndication of a cartoon provided that it would be automatically renewed from year to year unless plaintiff's share from the syndication did not equal certain stipulated weekly payments, in which event either party had the right to terminate it. The court ruled that the automatic renewal provision did not make the contract of indefinite duration. While there was no specific date of termination, there was a specific provision for termination upon the happening of the event that certain minimum payments were not made. New York, unlike Ohio, has a mandatory access law for franchised cable television companies (Public Service Law § 228). This statute means that so long as TWC holds a franchise for the area of Manhattan that includes the Dorchester, TWC has the right to serve tenants requesting its franchised cable television service and has the right to maintain its facilities at the building free of interference. In the absence of an express term fixing the duration of a contract, New York courts can inquire into the intent of the parties and supply the missing term if a duration can be fairly and reasonable fixed by the surrounding circumstances (Haines v. City of New York, 41 N.Y.2d 769). Since a cable company cannot operate any cable system without a franchise from the applicable municipality confirmed by the state Public Service Commission (Public Service Law § 212(1), (2), 219 and 221), the

Dorchester-TWC agreement can reasonably be read to contain an implied term that it would terminate upon the termination of the franchise. The contract remains in force unless and until the appropriate governmental agency terminates the TWC franchise.

In support of its claim that TWC is improperly interfering with television service to the building, Dorchester cites Public Service Law § 228(3), which provides that no cable company may enter into an agreement with the owners, lessees or persons controlling or managing buildings served by a cable company to do any act which would have the direct or indirect act of interfering with the existing rights of any tenants of such building to use the master or individual antenna equipment (MATV). This section, however, does not apply, for several reasons. First, neither TWC nor Liberty is an MATV service. Second, the building has an MATV system and TWC is neither using it nor preventing anyone else from using it.

TWC has established a probability of success. Where there is a continuing trespass to or conversion of facilities, an injunction is a permissible remedy (New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 691) (court enjoined municipality from attaching its street lights to poles owned by the telephone company and ordered the removal of lighting fixtures).

Unless Dorchester, or its licensee, Liberty, is prevented from running its system through TWC's cable facilities, TWC runs the risk of service or maintenance disruptions. This potentially would result in lost business, the amount of which cannot readily

be calculated by TWC. There is a danger of irreparable injury in the absence of an injunction. Moreover, so long as TWC permits Liberty to run the necessary lines from subscribers' apartments through the molding within the demarcation area (within 12 inches of the respective apartments), the balancing of the equities favors TWC's right to be free from trespass or interference with respect to the balance of its system (i.e. outside the demarcation area). With respect to the TWC system outside the demarcation area, TWC is entitled to an injunction prohibiting Dorchester from placing further cable equipment within TWC's molding area, and directing Dorchester to remove previously placed cable from the affected area.

Accordingly, the motion is granted to the extent that Dorchester, and its designees, are prohibited from using TWC's cable facilities except those within the above mentioned demarcation area, and is directed to restore remove any cables or other equipment heretofore installed within TWC's facilities outside the demarcation area.

Finally, the Court, sua sponte, directs that plaintiff join Liberty Cable as a party defendant. (CPLR 1001, 1003; New York State Inspection v. State, 106 Misc.2d 654, 658).

Settle order providing for an undertaking.

Dated:

JUL 16 1998

CAROL E. HUFF